

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LESLIE A. BERENS,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

CASE NO. C14-0368-RSL-MAT

REPORT AND RECOMMENDATION
RE: SOCIAL SECURITY DISABILITY
APPEAL

Plaintiff Leslie A. Berens proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends this matter be REMANDED for further proceedings.

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REPORT AND RECOMMENDATION
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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1964.¹ She has a high school education. She has past relevant work as a receptionist, hair stylist, and bookkeeper. (AR 20.)

Plaintiff filed an application for DIB on December 21, 2010, alleging disability beginning May 13, 2010. She is insured for DIB through March 31, 2012. Plaintiff's application was denied at the initial level and on reconsideration, and she timely requested a hearing.

On July 26, 2012, ALJ Laura Valente held a hearing, taking testimony from plaintiff and a vocational expert. (AR 27-65.) On November 2, 2012, the ALJ issued a decision finding plaintiff not disabled from May 13, 2010 through the date last insured. (AR 28-66.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on January 17, 2014 (AR 1-4), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since the alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's carpal tunnel syndrome status post release in February 2011, cognitive disorder, affective

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 disorder, and anxiety disorder severe. Step three asks whether a claimant's impairments meet or
2 equal a listed impairment. The ALJ found plaintiff's impairments did not meet or equal the
3 criteria of a listed impairment.

4 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
5 residual functional capacity (RFC) and determine at step four whether the claimant has
6 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to lift
7 and/or carry up to twenty pounds occasionally and ten pounds frequently, stand and/or walk
8 about six hours in an eight-hour workday, and sit up to six hours in an eight-hour workday.
9 Plaintiff can perform all postural activities without limitation, and frequently reach overhead
10 with the right upper extremity. Plaintiff has sufficient concentration to understand, remember,
11 and carry out simple, repetitive tasks. She can maintain concentration in two-hour increments
12 with usual and customary breaks, throughout an eight-hour day. Plaintiff can work in proximity
13 to co-workers, but not in coordination with them. With these restrictions, plaintiff was found
14 able to work at a consistent pace with usual and customary breaks throughout an eight-hour day.
15 She can work superficially and occasionally with the general public, interact frequently with
16 supervisors, and deal with workplace changes consistent with simple repetitive work. With that
17 assessment, the ALJ found plaintiff unable to perform her past relevant work.

18 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to
19 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
20 adjustment to work that exists in significant levels in the national economy. With the assistance
21 of a vocational expert, the ALJ found plaintiff capable of performing other jobs, such as small
22 products assembler, inspector and hand packager, and housekeeping cleaner. The ALJ also found
23 that if additional limitations of frequent bilateral fine fingering and gross handling were

1 considered, plaintiff could perform the jobs of inspector hand packager and housekeeper cleaner.

2 This Court's review of the ALJ's decision is limited to whether the decision is in
3 accordance with the law and the findings supported by substantial evidence in the record as a
4 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
5 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
6 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747,
7 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the
8 ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954
9 (9th Cir. 2002).

10 Plaintiff argues the ALJ failed to properly consider limitations relating to her hand
11 impairment in formulating the RFC, failed to give legally sufficient reasons for finding her
12 subjective symptom testimony not entirely credible, and did not properly consider the opinion of
13 an evaluating neuropsychologist. She requests remand for an award of benefits or, alternatively,
14 for further administrative proceedings. The Commissioner argues the ALJ's decision is
15 supported by substantial evidence and should be affirmed.

16 Consideration of Hand Impairment in RFC

17 At step four, the ALJ must identify plaintiff's functional limitations or restrictions, and
18 assess her work-related abilities on a function-by-function basis, including a narrative discussion.
19 *See* 20 C.F.R. §§ 404.1545, 416.945; Social Security Ruling (SSR) 96-8p. RFC is the most a
20 claimant can do considering his or her limitations or restrictions. *See* SSR 96-8p. The ALJ must
21 consider the limiting effects of all of plaintiff's impairments, including those that are not severe,
22 in determining RFC. §§ 404.1545(e), 416.945(e); SSR 96-8p.

23 Plaintiff argues the ALJ failed to sufficiently account for limitations in the use of her

1 hands in formulating a RFC assessment.² The Court agrees the ALJ's RFC does not appear to
2 take into account any limitations in the use of her hands, despite an assertion by the ALJ to the
3 contrary. (AR 19.) Plaintiff cites ample record evidence that would support the assessment of
4 some functional limitations in the use of her hands. However, it is not enough to merely suggest
5 an alternative interpretation of the evidence if the one chosen by the ALJ is equally reasonable.
6 *Morgan v. Commissioner of the SSA*, 169 F.3d 595, 599 (9th Cir. 1999) ("Where the evidence is
7 susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be
8 upheld."). The question is whether the interpretation of the evidence chosen by the ALJ is
9 supported by legally sufficient evidence.

10 The ALJ cited the successful surgical release of plaintiff's carpal tunnel syndrome to
11 support the lack of hand limitations. As support for this conclusion, the ALJ provides a general,
12 non-specific citation to the surgical records. (AR 530-61.) A review of these records does not
13 provide any information about residual hand limitations, and does not lend substantial evidence
14 support to the ALJ's conclusion.

15 The ALJ notes that plaintiff's complaints of osteoarthritis or rheumatoid arthritis started
16 "only" about one month prior to the July 2012 hearing. (AR 18.) However, plaintiff provides
17 citations to medical records that verify the presence of problems with her hands before that date.
18 (AR 626 (April 2012 record mentioning inability to make a fist, puffiness, and swelling), 642
19 (November 2011 record mentioning "sausage-like fingers with swellness and stiffness of joints
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21 ² The Commissioner mischaracterizes plaintiff's argument as contending the ALJ erred at step
22 two by finding her right shoulder pain not a medically determinable impairment and by failing to find her
23 right hand pain severe at step two. (Dkt. 21 at 5.) Plaintiff's reference to her right shoulder pain was in
the context of her credibility argument, and, at step two, the ALJ did, in fact, find a hand impairment to be
severe. Rather, the Court considers plaintiff's argument as positing an RFC error by failing to include
appropriate hand limitations as discussed herein.

1 in hand), and 663 (February 2012 record mentioning hand pain of six months duration).) The
2 possibility of an inflammatory arthropathy or degenerative arthritis was clearly considered by the
3 medical providers prior to July 2012. (*See, e.g.*, AR 627.)

4 The ALJ relies on the fact that plaintiff was no longer taking medication or undergoing
5 therapy for the condition and that x-rays were largely unremarkable. As stated above, plaintiff
6 continued periodically to seek treatment for her hand problems, and there is no showing
7 medication was available that might provide any therapeutic effect. The ALJ also fails to
8 mention the February 2012 MRI, taken after the December 2011 x-ray, showing “degenerative
9 arthritic changes at the first metacarpophalangeal joint.” (AR 663.)

10 The ALJ characterizes claimant’s testimony about her activities as not consistent with her
11 claim of hand limitations. (AR 18.) However, the ALJ’s description of the activities downplays
12 plaintiff’s complaints about her ability to perform the activities. Plaintiff did not testify she
13 could grip the steering wheel without problems, but indicated her problems worsened in the last
14 few weeks. (AR 48.) Folding clothes can only be done with significant pain. (AR 50.) Her
15 ability to use the computer is limited. (*Id.*) Although yard work is a hobby she would enjoy, she
16 is only able to spend forty five minutes a week cutting the grass and pulling a few weeds, leaving
17 radiating and aching pain in her wrist. (AR 55.) The activities described by plaintiff do not
18 provide substantial evidence support for the ALJ’s rejection of hand limitations.

19 The ALJ acknowledged the records of Rheumatologist Heather Kramm, M.D. from the
20 Seattle Arthritis Clinic corroborated plaintiff’s hand complaints of pain and difficulty gripping,
21 noting plaintiff’s symptoms to be consistent with inflammatory arthropathy. (AR 19, 678-80.)
22 The ALJ gives “less weight” to Dr. Kramm’s records because they “were prepared after the
23 hearing, for a visit that took place after the hearing,” inferring plaintiff “reported symptoms and

1 created the appointment to justify more severe limitations than the residual functional capacity
2 identified at the hearing.” (AR 19.) However, the ALJ makes no reference to the fact Dr.
3 Kramm had been treating plaintiff for the same problems since at least December 2011, and
4 continuing up to the hearing. (AR 634.) At the commencement of the hearing, plaintiff’s
5 attorney advised the ALJ of the upcoming appointment (AR 30) and the ALJ instructed counsel
6 to submit the records post-hearing (AR 63). The Court finds unpersuasively vague the ALJ’s
7 rationale that Dr. Kramm’s findings “are not support[ed] by other, more persuasive medication
8 [sic] evidence,” and unsupported by plaintiff’s description of her level of activity and
9 functionality, as previously discussed.

10 Next, the ALJ cited a lack of objective evidence of rheumatoid arthritis or inflammatory
11 arthropathy, but overlooked a “borderline positive rheumatoid factor” (AR 636), and the MRI
12 findings (AR 663). The Court finds this reason does not stand up under scrutiny.

13 Finally, the Court finds unpersuasive the ALJ’s reasoning that a lack of an opinion from a
14 treating doctor that plaintiff cannot work was persuasive evidence plaintiff is not disabled. (AR
15 19.) A statement by a medical source that a claimant is “disabled” or “unable to work” is not
16 considered to be a medical opinion, but is an administrative finding that would be dispositive of
17 a case, and is an issue reserved to the Commissioner. 20 C.F.R. § 404.1527 (d)(1) and (3). If, in
18 fact, the ALJ felt the record was deficient without an opinion from plaintiff’s treating doctor
19 about her ability to work, the ALJ could have requested an opinion on this issue. *Brown v.*
20 *Heckler*, 713 F.2d 441, 443 (9th Cir. 1983) (An ALJ does have a “special duty to fully and fairly
21 develop the record and to assure that the claimant’s interests are considered”).

22 The Court finds the ALJ’s failure to include RFC limitations related to plaintiff’s hand
23 impairment to lack the support of substantial evidence. The error is not harmless, as plaintiff’s

1 ability to perform alternative work may be impacted by properly assessed limitations. On
2 remand, the ALJ should properly consider plaintiff's hand limitations, obtaining an evaluation by
3 a specialist, if necessary, in order to ascertain the degree of functional impairment caused by this
4 impairment.

5 Consideration of the opinion of Temperence Evans, Psy.D.

6 Plaintiff correctly notes that the ALJ failed to specifically address the findings and
7 opinions by Dr. Evans, an examining neuropsychologist. (AR 569-83.) The findings, which
8 involve plaintiff's cognitive and emotional functioning, are pertinent to an evaluation of
9 plaintiff's mental functional capacity. Although defendant asserts the ALJ made reference to
10 findings from Dr. Evans' examination (AR 14, citing Ex. 13F at 10-11), the citation to these
11 references, in the absence of any evaluation of Dr. Evans' findings, is error. The ALJ "may not
12 reject 'significant probative evidence' without explanation." *Flores v. Shalala*, 49 F.3d 562,
13 570-71 (9th Cir. 1995) (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984)). On
14 remand, the ALJ should consider Dr. Evans' report and findings. If necessary, the ALJ should
15 obtain clarification from Dr. Evans about the applicability of the findings to plaintiff's functional
16 capacity.

17 Credibility Assessment

18 Plaintiff also assigns error to the ALJ's consideration of her symptom allegations.
19 Credibility determinations are inescapably linked to conclusions regarding medical evidence.
20 *See* 20 C.F.R. § 404.1529. On remand, after reconsidering the medical evidence as previously
21 described, the ALJ should reevaluate the credibility of plaintiff's symptom allegations.

22 Remedy

23 The Court has discretion to remand for further proceedings or to award benefits. *See*

1 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of
2 benefits where “the record has been fully developed and further administrative proceedings
3 would serve no useful purpose.” *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002).

4 Such a circumstance arises when: (1) the ALJ has failed to provide legally
5 sufficient reasons for rejecting the claimant’s evidence; (2) there are no
6 outstanding issues that must be resolved before a determination of disability can
be made; and (3) it is clear from the record that the ALJ would be required to find
the claimant disabled if he considered the claimant’s evidence.

7 *Id.* at 1076-77.

8 Here, the Court finds remand for further proceedings appropriate. Plaintiff’s ability to
9 work with appropriate limitations related to her hand impairment remains to be determined. As
10 previously stated, the ALJ may need to develop the record by obtaining additional medical and
11 vocational testimony in order to address this issue, as well as reassessing the credibility of
12 plaintiff’s complaints.

13 CONCLUSION

14 For the reasons set forth above, this matter should be REMANDED for further
15 proceedings.

16 DEADLINE FOR OBJECTIONS

17 Objections to this Report and Recommendation, if any, should be filed with the Clerk and
18 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and
19 Recommendation is signed. Failure to file objections within the specified time may affect your
20 right to appeal. Objections should be noted for consideration on the District Judge’s motions
21 calendar for the third Friday after they are filed. Responses to objections may be filed within
22 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will

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1 be ready for consideration by the District Judge on **December 26, 2014**.

2 DATED this 5th day of December, 2014.

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5 Mary Alice Theiler
6 Chief United States Magistrate Judge
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